IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No 959 of 1992
to
CRIMINAL MISC. APPLICATION No 967 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO

SHRI VINODCHANDRA C PATEL

Versus

STATE OF GUJARAT

Appearance:

MR KA PUJ for Petitioners
MR AJ DESAI APP for Respondent No. 1
MR BB NAIK for Respondent No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 08/09/2000

C.A.V. COMMON JUDGEMENT

1. Heard learned counsel Mr.Puj for the petitioners, learned counsel Mr.Naik for respondent No.2 - Income Tax authority, and learned A.P.P. Mr.Desai for the State in all these matters. As was agreed and stated at the Bar, all these matters involve common legal issues and therefore they are, by consent, disposed by this common judgment.

2. The petitioner in Criminal Misc. Applications Nos. 959 to 961 of 1992 is a partner in the firm which is the petitioner in Criminal Misc. Applications Nos.965 to 967 of 1992. The petitioner in Criminal Misc. Applications Nos.962 to 964 of 1992 is also a partner in the same firm as the first mentioned petitioner. Thus, the two partners and the partnership firm have approached this Court with a prayer to quash the complaints and the criminal proceedings in the various pending criminal cases initiated by the Inspecting Assistant Commissioner of Income Tax, Ahmedabad.

3. The offences alleged against the petitioners are one or more or all of the offences defined or made punishable under Sections 276-C (1), 276-C (2), 276-CC and 277 of the Income Tax Act, 1961 (the "Act"). The offences alleged against the petitioners are in respect of the assessment years 1980-81 to 1984-85. Primarily the complaint against the petitioners are arising from late filing of income tax returns, non-payment of advance tax, wilful attempt to evade tax, penalty or interest, false statement in verification etc.

4. There is no controversy about the fact that the partners and the partnership firm were required to file their returns of income by the prescribed date and that they had failed in doing so. The petitioners had also failed to pay any advance tax at the time when it was payable. In most of the cases, the petitioners were required by notice under Section 139 (2) of the Act to furnish their returns of income. Thereafter, when the returns were filed and the assessment was finalised under Section 143 (3) of the Act and the tax payable, interest and penalty were also determined, they were paid. Broadly on these facts, it is alleged in the original complaints that by filing the returns late and only after the notice under Section 139 (2), the petitioners had wilfully evaded payment of self-assessment tax payable under Section 140-A of the Act. Thus, the offences punishable under Sections 276-C (2) and 276-CC are alleged to have been committed by the petitioners. In Criminal Misc. Applications Nos.963 of 1992 and 964 of 1992, the offences punishable under Sections 276-C (1)

and 277 are also alleged to have been committed by wilful attempt to evade tax, penalty or interest and on account of false statement made in the verification etc.

5. Addressing the arguments common to all these cases, the learned counsel for the petitioners has submitted that the lapses on the part of the petitioners are of technical nature and the complainant has singled out the petitioners for prosecution. It is also submitted that, even assuming the allegations against the petitioners to be true, there is no element of mens rea which can be attributed to the petitioners particularly in view of the facts that the petitioners have paid up all the amounts, interest charged and the penalty imposed. As against these submissions, Mr.Naik appearing for the Department has submitted that the allegation that the petitioners are singled out for criminal prosecution are baseless and, in any case, the criminal cases cannot be quashed only on the ground that other assessees committing similar defaults are not prosecuted. As regards the plea of absence of mens rea, the provisions of Section 278-E are relied upon to submit that a culpable mental state on the part of the accused has to be presumed in the prosecution for any offence under the Act. It is further submitted that although Section 278-E is introduced in 1986, it has retrospective effect and it applies to the pending proceedings.

6. The main controversy in these cases centres around the provisions of Section 276-C of the Act, which reads as under:

"S. 276-C : Wilful attempt to evade tax, etc.

(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable -

(i) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may

extend to three years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

Explanation:- For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case, where any person-

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstances to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

Since the offences under Section 276-C (2) are alleged in all the complaints, it is vehemently argued and stressed on behalf of the petitioners that Section 276-C (2) does not at all apply in the facts of these cases for the reasons that the assessee concerned has not evaded the payment of any tax, penalty or interest in any manner but, instead, such amounts of tax, penalty or interest were immediately paid. In this context, the petitioners have relied upon the judgment in one of the petitioners' own case decided by this Court in V.C.SHAH v. STATE OF GUJARAT [1995 (213) ITR 307]. It is held in the said

judgment in the case of one of the present petitioners that in the facts of that case there was not even a whisper that there was wilful attempt in any manner whatsoever to evade the payment of tax and hence the process issued was required to be quashed. The observations made by the Kerala High Court in G.VISWANATHAN's case [1987 (167) ITR 103] are referred to for the proposition that sub-section (2) of Section 276-C talks about the case of evasion of tax, penalty or interest after assessments were made. The aforesaid judgment of the Kerala High Court is relied for the further proposition that Section 276-C (2) deals with evasion of tax after quantification and becomes applicable only after the income is assessed and the assessee attempts to evade payment.

7. The wordings and language in both sub-section (1) and sub-section (2) of Section 276-C of the Act appear to be identical except for two important differences. While sub-section (1) deals with evasion of any tax, penalty or interest "chargeable or imposable" under the Act, sub-section (2) deals with the evasion of the "payment" of any tax, penalty or interest under the Act. The Explanation given below the section makes it clearer that two sets of penal provisions are sought to be made; one for evasion of tax, penalty or interest which is chargeable or imposable and the other for the evasion of payments of any tax, penalty or interest in respect of which the words "chargeable or imposable" are not applying. Therefore, it would appear that the provisions of sub-section (1) of Section 276-C operate when any tax, penalty or interest is chargeable or imposable and the same is alleged to have been evaded. On the other hand, the provisions of Section 276-C (2) would operate when the payment of tax, penalty or interest is due and an attempt is made to evade the payment thereof. In the facts of the present cases, except in Criminal Misc. Applications Nos.963 and 964 of 1992, the provisions of sub-section (1) of Section 276-C are neither invoked by the Department nor is it alleged that the payment of tax, penalty or interest were attempted to be evaded by the petitioners even after the income and tax was assessed and interest and/or penalty were imposed.

8. In this view of the matter, as far as the petitioners are charged with the offence under Section 276-C (2), they would be required to be discharged and the complaints and the criminal proceedings to that extent are required to be quashed.

9. As far as the offences under Section 276-C (1)

and Section 277 of the Act are concerned, there are clear allegations of late filing of income tax returns and wilful attempt at evading the tax. As seen earlier, a complaint in this regard cannot be quashed only on the ground that the petitioners have averred that there was no element of mens rea in their alleged defaults or that in the hundreds of similar cases the Department was desisting from filing criminal complaints.

10. It is pointed out on behalf of the petitioner-firm in Criminal Misc. Applications Nos.965 to 967 of 1992 that these cases involve only the offence under Section 276-C (2) and even the order of penalty in respect of the assessment year 1982-83 was cancelled by the Department itself. Otherwise, factually, the default alleged against the petitioner in these three matters is non payment of advance tax only.

11. In the facts and circumstances as above, Criminal Misc. Applications Nos.965, 966 and 967 of 1992 are allowed and the Criminal Cases Nos.374, 375 and 376 of 1986 and the proceedings therein are quashed and the Rule issued therein is made absolute. In the other Criminal Misc. Applications Nos.959 to 964 of 1992, as the offences under the provisions other than sub-section (2) of Section 276-C are alleged, the complaints and criminal proceedings are not quashed and have to be ordered to be expeditiously conducted. However, as far as the offences alleged under Section 276-C (2) are concerned, the observations made hereinabove shall apply. Accordingly, these last mentioned six Criminal Misc. Applications are rejected and Rule is discharged with no order as to costs. The interim relief operating in these Criminal Misc. Applications stands vacated.

Sd/-

(KMG Thilake)

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